UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL CROOKSTON,

Plaintiff,

v.

RUTH JOHNSON,

Defendant.
_____/

Case No. 1:16-cv-1109

HON. JANET T. NEFF

OPINION AND ORDER

Now pending before the Court in this declaratory judgment action is Plaintiff Joel Crookston's Motion for Preliminary Injunction (Dkt 12). For the reasons stated herein, the Court grants Plaintiff's motion and will enter a Preliminary Injunction.

I. BACKGROUND

A. Findings of Fact

Plaintiff is a lifelong resident of Michigan (Dkt 1, Verified Compl. ¶ 9). He first registered to vote in 2002, has voted in most primary and general elections since then, and is a qualified elector under Michigan law (*id.*). He intends to vote in the upcoming general election on November 8, 2016, as well as future Michigan primary and general elections (*id.*).

Defendant Ruth Johnson is the Secretary of State of the State of Michigan (Dkt 1, Verified Compl. ¶ 10). Secretary Johnson has the duty to "[a]dvise and direct local election officials as to the proper methods of conducting elections." MICH. COMP. LAWS § 168.31(b). Furthermore, Secretary Johnson has the power to investigate and refer violations of the challenged provisions for prosecution. MICH. COMP. LAWS § 168.31(h).

Plaintiff owns and usually carries a cell phone that is capable of capturing digital photographs and video and uploading such files to social media accounts (Dkt 1, Verified Compl. ¶ 11). On November 6, 2012, Plaintiff responded to a prompt on social media to write-in vote for an acquaintance from college for an office in the Michigan general election (*id.* ¶ 1). After voting, Plaintiff not only disclosed his vote but also provided a photograph of part of his marked ballot, i.e., a "ballot selfie," which he took with his cell phone within a voting station inside a polling place (*id.*; Dkt 13 at PageID.41-42). For this activity, Michigan law requires the rejection of Plaintiff's ballot and forfeiting his right to vote in a primary or general election. *See* MICH. COMP. LAWS §§ 168.579, 168.738(2). Further, under current instructions or orders from Secretary Johnson, *see infra*, Plaintiff could be imprisoned and fined for photography in a polling place or voting station.

B. Procedural Posture

On September 9, 2016, Plaintiff filed a three-count Verified Complaint for Declaratory and Injunctive Relief, alleging the following counts:

I. MICH. COMP. LAWS § 168.579 and § 168.738(2) Violate the First Amendment

II. The Secretary of State's Instruction and Order Regarding Photography in Polling Places ("Secretary's Rule 1") Violates the First and Fourteenth Amendments

III. The Secretary of State's Instruction and Order Regarding the Use of Cell Phones in Voting Stations ("Secretary's Rule 2") Violates the First Amendment

(Dkt 1). According to Plaintiff, his lawsuit endeavors to respect the integrity of the voting process, including ballot secrecy, "while calling upon this Court to recognize that circumstances today—namely, the advancement of technology and the advent of new outlets for political speech through social media on the Internet—require existing law to be more reasonably tailored" (Dkt 13 at PageID.42).

On September 23, 2016, Plaintiff filed the instant motion for a preliminary injunction (Dkt 12), requesting this Court enter an order enjoining Secretary Johnson from "enforcing MICH. COMP. LAWS §§ 168.579, 168.738(2) against the photographing of one's own ballot and display of such photographs outside of polling places" and to "enjoin enforcement of orders identified as Secretary's Rule 1 and Secretary's Rule 2," *infra* (*id.* at PageID.38). On October 3, 2016, Defendant filed a Response in opposition to the motion (Dkt 16). Plaintiff filed a Reply on October 10, 2016 (Dkt 17). The Court finds that the relevant facts and arguments are adequately presented in these materials and that oral argument would not aid the decisional process. *See* W.D. Mich. LCivR 7.2(d).

II. DISCUSSION

A. Motion Standards

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* Accordingly, a party "is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits." *Id.*

Federal Rule of Civil Procedure 65, which governs the issuance of preliminary injunctions, does not explicitly require the court to conduct an evidentiary hearing before issuing an injunction. FED. R. CIV. P. 65(a)(1). The Sixth Circuit Court of Appeals has held that an evidentiary hearing is only required when there is a disputed factual issue and the documentary evidence upon which

to base an informed, albeit preliminary, conclusion is inadequate. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 552-53 (6th Cir. 2007); *S.E.C. v. G. Weeks Sec., Inc.*, 678 F.2d 649, 651 (6th Cir. 1982).

In evaluating a request for a preliminary injunction, a district court should consider: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without a preliminary injunction; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (citing *American Imaging Servs., Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 858 (6th Cir. 1992)). The party seeking the preliminary injunction bears the burden of justifying such relief. *Id.* (citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974)). The four considerations are factors to be balanced and not prerequisites that must be satisfied. *Id.* Indeed, in First Amendment cases, the first factor will often be determinative. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001).

B. Conclusions of Law

1. *Likelihood of Success on the Merits*

The First Amendment provides that Congress cannot pass a law "abridging the freedom of speech" of citizens of the United States. U.S. CONST. amend. I. The First Amendment applies with equal force to state laws and regulations through the Fourteenth Amendment. U.S. CONST. amend. XIV; *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015). "'[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. . . . including discussions of candidates . . . .'" *Buckley v. Valeo*,

424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). "The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

The Supreme Court's 2015 decision in *Reed v. Town of Gilbert*, ____ U.S. ____; 135 S. Ct. 2218; 192 L. Ed. 2d 236 (2015), sought to clarify the level of review due to certain speech prohibitions. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016). That test focused on whether a law was content-based at all, rather than the type of content the law targeted. *Id.* The *Reed* Court held that strict scrutiny is the appropriate level of review when a law governs any "specific subject matter ... even if it does not discriminate among viewpoints within that subject matter." *Id.* (quoting *Reed*, 135 S. Ct. at 2230). Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Previously, in *Russell*, 784 F.3d at 1037, the Sixth Circuit relaxed the strict scrutiny standard when applied to a state law that burdens political speech, holding that the court "will hold that a state law satisfies strict scrutiny's narrow-tailoring prong 'provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.'" *Id.* at 1050-51 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)).

The government may regulate the time, place, and manner of expressive activity, "so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson*, 504 U.S. at 197. Such a regulation "need not be the least restrictive or least intrusive means" of serving the government's

interests; however, the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (quoting *Ward v Rock Against Racism*, 491 U.S. 781, 799 (1989)).

At issue in this case are two provisions of the Michigan Election Code, the topic of Plaintiff's Count I, and two corresponding rules issued by Secretary Johnson, addressed in Plaintiff's Counts II and III. The Court determines that the parties presented sufficient documentary evidence upon which to base an informed—albeit preliminary—legal conclusion on these claims, to wit: that Plaintiff has borne his burden of demonstrating a substantial likelihood that the two state laws, and corresponding rules, are unconstitutional under the First Amendment.

a. Count I: "MICH. COMP. LAWS §§ 168.579 and § 168.738(2) Violate the First Amendment"

In pertinent part, the Michigan Election Code provides as to voting in a primary election that "[i]f an elector, after marking his or her ballot, exposes it to any person in a manner likely to reveal the name of any candidate for whom the elector voted, the board of election inspectors shall reject the ballot and the elector shall forfeit the right to vote at the primary." MICH. COMP. LAWS § 168.579. The provision applying to all elections similarly provides that

> If an elector shows his or her ballot or any part of the ballot to any person other than a person lawfully assisting him or her in the preparation of the ballot or a minor child accompanying that elector in the booth or voting compartment under section 736a, after the ballot has been marked, to disclose any part of the face of the ballot, the ballot shall not be deposited in the ballot box, but shall be marked "rejected for exposure", and shall be disposed of as are other rejected ballots. If an elector exposes his or her ballot, a note of the occurrence shall be entered on the poll list opposite his or her name and the elector shall not be allowed to vote at the election.

MICH. COMP. LAWS § 168.738(2). Moreover, "[a]ny person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not exceeding $500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court." MICH. COMP. LAWS § 168.934.

Plaintiff argues that MICH. COMP. LAWS §§ 168.579 and 168.738(2) are content-based restrictions that, as applied to ballot selfies, serve no governmental interest and fail tailoring under either strict scrutiny or relaxed strict scrutiny, and that these laws serve no governmental interest and are not reasonably tailored (Dkt 13 at Page ID.45-49).

In response, Secretary Johnson argues that "a marked ballot is not necessarily speech," but, "to the extent speech is involved, these provisions and instructions are (1) content-neutral; (2) reasonable time, place and manner restrictions; and (3) reasonable, viewpoint-neutral restrictions on speech in a nonpublic forum" (Dkt 16 at PageID.86). Secretary Johnson argues that the provisions and instructions also survive "more exacting scrutiny" (*id.*).

As a threshold matter, the Court assumes, arguendo, that both state laws are content-based because they restrict the display of only "marked" ballots. In reviewing New Hampshire's law, which similarly prohibits photography of a "marked" ballot, the district court likewise reasoned that the law "is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter." *Rideout v. Gardner*, No. 15-2021, 2016 WL 5403593, at *4 (1st Cir. Sept. 28, 2016) (ultimately declining to decide whether the state law is a content-based regulation).

Again, content-based laws are "presumptively unconstitutional." *Reed*, 135 S. Ct. at 2226. According to Secretary Johnson, the provisions here survive because "the State has a compelling interest in the integrity of the election by protecting the secrecy of the ballot and ensuring an orderly election" (Dkt 16 at PageID.65). However, on the current record, Plaintiff has successfully demonstrated that MICH. COMP. LAWS §§ 168.579 and 168.738(2) "significantly impinge" upon First Amendment free speech rights, and, in prohibiting ballot selfies, fail tailoring, under either strict or relaxed strict scrutiny, assuming the latter standard even applies to displaying a ballot outside the polling place. Plaintiff persuasively argues that these two laws are not properly tailored but reach and prohibit innocent free speech by voters, who are not implicated by the state's interest in avoiding vote buying or intimidation.

Even assuming arguendo that the laws are content-neutral, as Secretary Johnson advocates, Plaintiff also persuasively argues that the laws are unconstitutional under even intermediate scrutiny, where the interests at issue may be addressed with less intrusive, or more targeted means. According to Secretary Johnson, "camera phone photos" (1) "open new ways to expose a marked, secret ballot," which "facilitates vote-buying and coercion (which Michigan can prove), as well as more subtle forms of vote intimidation"; and (2) infringe on "the rights of *other* voters in the exercise of *their* right to vote by causing intimidation, disruption, and long lines at the polls" (Dkt 16 at PageID.74, 88-92 [emphases in original]).

However, the cases cited by Secretary Johnson in her response brief (Dkt 16 at PageID.89-90), constitute evidence merely of vote-buying schemes, unrelated to ballot photography. As Plaintiff points out, Secretary Johnson "offers nothing to show self-disclosure of ballot photography has played a role in vote-buying schemes or threatened other voters with intimidation, distraction

or delay" (Dkt 13 at PageID.48; Dkt 17 at PageID.262). Plaintiff rejects "ballot integrity" as a "wholly speculative" interest (Dkt 13 at PageID.47).

In concluding that New Hampshire had not attempted to tailor its solution to the potential problem it perceived, the First Circuit Court of Appeals reasoned that (1) "the prohibition on ballot selfies reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons," and (2) New Hampshire "has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified." *Rideout*, 2016 WL 5403593, at *7 (citing, e.g., 18 U.S.C. § 597 (prohibiting buying or selling votes); 52 U.S.C. § 10307(b) (prohibiting voter coercion or intimidation); *id.* § 10307(c) (prohibiting "pay[ing] or offer[ing] to pay or accept[ing] payment either for registration to vote or for voting" in some federal elections)). In addition to the same federal protections, Michigan also has state law provisions protecting voting integrity. *See, e.g.,* MICH. COMP. LAWS § 168.738(1) ("Before leaving the booth or voting compartment, the elector shall fold his or her ballot or each of the ballots so that no part of the face shall be exposed . . ."); MICH. COMP. LAWS § 168.932(d) ("A person shall neither disclose to any other person the name of any candidate voted for by any elector, the contents of whose ballots were seen by the person . . . .").

In short, Plaintiff has shown "more than a mere possibility of success" on his claim in Count I that MICH. COMP. LAWS §§ 168.579 and § 168.738(2) violate the First Amendment. *See Certified Restoration*, 511 F.3d at 543 (quoting *Six Clinics Holding Corp. v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997)). Plaintiff raises questions going to the merits that are "so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Id. See, e.g.*, *Rideout v. Gardner*, 123 F.Supp.3d 218 (D. N.H. 2015)

(declaratory judgment against ballot photography ban); *Am. Civil Liberties Union of Ind. v. Ind. Sec. of State*, No. 15-cv-01356, Doc. No. 32 (S.D. Ind. 2015) (preliminary injunction against ballot photography ban).

b. Count II: "The Secretary of State's Instruction and Order Regarding Photography in Polling Places ("Secretary's Rule 1") Violates the First and Fourteenth Amendments"

Secretary Johnson maintains the following instruction for polling places in all elections:

> Persons shall not use video cameras, cell phone cameras or video recording, cameras, television or recording equipment in the polling place, except that broadcast stations and credentialed media may be permitted to briefly film from [sic] public area. Personnel working for broadcast stations or media shall not set up cameras in the polling place. . . .

Actionable Election Day Offenses and Duty to Act Under State and Federal Statutes, Michigan Secretary of State, Oct. 24, 2014, at 2 (hereinafter referred to as "Secretary's Rule 1"), http://www.michigan.gov/documents/sos/Actionable_Election_Day_Offenses_472371_7.pdf. According to Secretary Johnson, these activities "provide a basis for prosecution under Michigan election law." *Id.* at 1.

Plaintiff argues that because of whom the rule allows to take photographs, the rule is a content-based speech restriction subject to strict scrutiny (Dkt 13 at PageID.52). Further, Plaintiff argues that the rule, as applied to voting and ballot selfies, serves no governmental interest and is not reasonably tailored (*id.*). Rather, according to Plaintiff, the Secretary's "outdated rule cuts off the most modern, relevant way news is delivered—through social media networks—while favoring the established, institutional, and antiquated press" (*id.* at PageID.53). Plaintiff argues that the rule also fails intermediate scrutiny inasmuch as the interests at issue may be addressed with less intrusive, or more targeted, means (*id.* at PageID.54-55). Plaintiff opines that it serves "no interest

to place a blanket prohibition on citizen photography" where "a typical citizen is no more or less of a threat than credentialed media" (*id.* at PageID.55). Plaintiff further opines that the content-based restriction similarly raises Fourteenth Amendment equal protection concerns (*id.* at PageID.55-56).

In response, Secretary Johnson merely reiterates the assertion that the rules are concerned "only with ensuring that photographs or videos do not interfere [with] the integrity of the election process by intimidating or distracting voters or disrupting or slowing the voting process" (Dkt 16 at PageID.87-88), an assertion that, on this record, is not supported. Secretary Johnson does not expressly address Count II and the ban on photography, other than to point out that without Rules 1 and 2, "the Secretary would have great difficulty training clerks to train inspectors to allow photography and not to intercede unless the voter is standing in such a position that no one could see his or her ballot while taking the photograph or ballot selfie" (Dkt 16 at PageID.93).

On this record, the Court agrees with Plaintiff that the interests in the integrity of the electoral process can be secured in a more reasonable manner than the blanket prohibition on citizen photography set forth in Secretary's Rule 1. "[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 135 S. Ct. at 2232 (internal quotation marks and citation omitted). The Court determines that Plaintiff has shown "more than a mere possibility of success" on his claim in Count II that Secretary's Rule 1 regarding photography in polling places violates the First and Fourteenth Amendments. *See Certified Restoration*, 511 F.3d at 543. Plaintiff raises questions going to the merits that are "so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.*

c. Count III: "The Secretary of State's Instruction and Order Regarding the Use of Cell Phones in Voting Stations ("Secretary's Rule 2") Violates the First Amendment"

Last, Secretary Johnson maintains the following instruction regarding the use of cell phones in polling places in all elections: "Persons shall not use cell phones once they have entered voting station. Cell phones may be used in the polling place by voters (while waiting in line), challengers and pollwatchers as long as they are not disruptive to the voting process." Actionable Election Day Offenses and Duty to Act Under State and Federal Statutes, Michigan Secretary of State, Oct. 24, 2014, at 2 (hereinafter referred to as "Secretary's Rule 2"), http://www.michigan.gov/documents/sos/Actionable_Election_Day_Offenses_472371_7.pdf. According to Secretary Johnson, this activity likewise "provide[s] a basis for prosecution under Michigan election law." *Id.* at 1.

Plaintiff argues that Secretary's Rule 2 entirely forecloses selfies or ballot selfies in voting booths where the State's interests in the integrity of the electoral process can be secured in a more reasonable manner than the prohibition in Secretary's Rule 2 (Dkt 13 at PageID.56-57). Again, Secretary Johnson does not expressly address Plaintiff's Count III, and, for the reasons previously stated, the Court determines that Plaintiff has shown "more than a mere possibility of success" on his claim that Secretary's Rule 2 regarding the use of cell phones in voting stations violates the First Amendment. *See Certified Restoration*, 511 F.3d at 543. Plaintiff raises questions going to the merits that are "so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.*

2. *Whether Plaintiff Will Suffer Irreparable Injury Without a Preliminary Injunction*

Again, "[w]hen a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative

factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). With regard to the factor of irreparable injury, "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)).

3. *Whether Issuance of a Preliminary Injunction Would Cause Substantial Harm to Others*

While fully mindful of the importance of an orderly election, and the amount of time left until the November 8, 2016 election, the Court is nonetheless unpersuaded that the burden to Secretary Johnson is a factor that tips the balance against issuance of the proposed preliminary injunction. The relief requested, to preliminarily enjoin enforcement of the laws and orders prohibiting the photographing of one's own ballot and display of such photographs outside of polling places, differs in both character and burden from the relief requested in cases cited by Secretary Johnson, e.g., to add candidates or initiatives to ballots. Indeed, the burden may not be as onerous as the parade of horribles set forth in Secretary Johnson's response. For example, Secretary Johnson indicates that at present, she has not and will not instruct local election officials to refer voters who expose their ballots in the polling place for criminal prosecution (Dkt 16 at PageID.96-97). Nor does Secretary Johnson presently instruct local election officials to refer violations of the photography and video recording for criminal prosecution (*id.*). And as to the potential harm to voters, whom Secretary Johnson opines may be "intimidated, disrupted or delayed" if the proposed preliminary injunction issues (Dkt 16 at PageID.97), "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu*, 274 F.3d at 400.

The Court notes here that in responding to Plaintiff's motion for a preliminary injunction, Secretary Johnson also included a lengthy argument based on laches, opining that Plaintiff's "delay in filing this lawsuit and in seeking a preliminary injunction is both inexcusable and severely prejudicial to the Secretary and the November 8 election process" (Dkt 16 at PageID.79-85). *See generally Brown-Graves Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000) (indicating that laches consists of two elements: "(1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party").

The Court is not persuaded that the doctrine of laches precludes preliminary injunctive relief in this case. As Plaintiff asserts in his reply, Secretary Johnson's laches argument assumes "(1) that Crookston knew or had reason to know his action was illegal when it occurred; (2) that the facts of Crookston's case are comparable to laches precedents; (3) that Crookston is vindicating only his past action; and (4) that the state's alleged administrative burden in this case is prejudicial" (Dkt 17 at PageID.259). In particular, the Court finds the laches argument unpersuasive inasmuch as the argument focuses on the delay by Plaintiff at bar, whereas Plaintiff is apparently "one of thousands of citizens who have taken 'selfies' or 'ballot selfies' in voting stations and polling places on election day" (Dkt 1, Verified Compl. ¶ 4). *See also Rideout*, 2016 WL 5403593, at *7, n.9 (indicating that in the 2012 election, "22% of registered voters have let others know how they voted on a social networking site such as Facebook or Twitter," "30% of registered voters [were] encouraged to vote for [a particular candidate] by family and friends via posts on social media such as Facebook and Twitter," and "20% of registered voters have encouraged others to vote by posting on a social networking site") (quoting Lee Raine, Pew Research Center, Social Media and Voting (Nov. 6, 2012), http://www.pewinternet.org/2012/11/06/social-media-and-voting/).

4. *Whether the Public Interest Would Be Served by Issuance of a Preliminary Injunction*

The determination of where the public interest lies also depends on a determination of the likelihood of success on the merits of the First Amendment challenge because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("the public as a whole has a significant interest in ... protection of First Amendment liberties").

In sum, upon review of the Verified Complaint and attached exhibits, and the motion briefing and exhibits of the parties, the Court determines that the balance of the factors weighs in favor of preliminarily enjoining Secretary Johnson from enforcing MICH. COMP. LAWS §§ 168.579, 168.738(2) and Secretary's Rules 1 and 2 against the photographing of one's own ballot and display of such photographs outside of polling places, pending resolution of this case or further Order of the Court.

The Court notes that in their written submissions to this Court, neither side identified any purpose that requiring a security under FED. R. CIV. P. 65(c) would serve. The Court therefore waives the security requirement. *See In re. Eagle-Picher Indus., Inc.*, 55 F.3d at 1176 ("While ... the language of Rule 65(d) appears to be mandatory, and many circuits have so interpreted it, the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security.").

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Preliminary Injunction (Dkt 12) is GRANTED, and a Preliminary Injunction shall issue.

DATED: October 24, 2016

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge